NO. 94013-4

SUPREME COURT OF THE STATE OF WASHINGTON

HARBOR PLUMBING,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Although the Legislature has given the Department of Labor and Industries discretion to adopt a rule that plumbers must wear their licenses, the Department chose not to exercise that discretion. Instead, the Department adopted a regulation that encourages, but does not require, plumbers to wear their licenses.

Because the regulation does not establish any requirement or penalize plumbers that do not comply, the regulation is not a "rule" under the Administrative Procedure Act (APA). The trial court properly dismissed Harbor Plumbing's claim that the Department did not comply with the APA's rulemaking procedures because they do not apply to regulations that are not rules.

The trial court also correctly dismissed Harbor Plumbing's request for a declaratory judgment that RCW 18.106.020(1)—the statute that authorizes the Department to issue a mandatory license-wearing rule—is unconstitutional. That claim is not justiciable under the Uniform Declaratory Judgments Act (UDJA) because it is rooted in speculation that the Department may adopt a mandatory license-wearing rule in the future. The voluntary regulation creates no actual dispute and does not harm

Harbor Plumbing's interests; therefore, its speculative claim is nonjusticiable. This Court should affirm.

II. ISSUES

1. **APA:** The APA defines a "rule" to include an agency regulation that subjects violators to a penalty or sanction, or that establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law. WAC 296-400A-024(3) recommends that plumbers wear their plumbing licenses while working, but it does not require them to do so or penalize them if they do not. Was it a "rule" that required the Department to comply with rulemaking notice requirements?

2. **Justiciability:** RCW 18.106.020(1) allows the Department to establish a rule that plumbers must wear their plumbing licenses while working. The Department did not establish that rule, but instead adopted a regulation that encourages plumbers to wear their licenses. Is a constitutional challenge to the statute justiciable when the requirement is not mandatory and therefore creates no dispute or harm to Harbor Plumbing's interests?

III. STATEMENT OF THE CASE

A. The Department Issued a Proposed Rule That Required Plumbers to Wear Their Plumbing Certificate and Received Conflicting Comments from the Plumbing Industry

In June 2015, the Department issued a preproposal statement of inquiry, informing the public about potential changes to the plumber certification rules.[1] AR 1. The Department stated that it may adopt a rule

[1] The Department issued the statement of inquiry under RCW 34.05.310(1)(a), which requires agencies to solicit comments from the public "on a subject of possible rule making" before the agency files a notice of proposed rulemaking.

that required the display of a valid plumbing certificate of competency. AR 1.

During preproposal review, the Department provided draft language that stated that "[t]o work in the plumbing trade, an individual must possess, wear, and visibly display on the front of the upper body a current, valid plumber certificate of competency." AR 3, 14, 139, 145.

The Department received "divided comments from the plumbing industry" about having to wear plumbing licenses. AR 43-51, 139. Some supported it, believing it would reduce unfair competition with unlicensed plumbers. AR 139; *see also* AR 43-51. But others stated that wearing licenses while working would compromise safety. AR 139; *see also* AR 43-51. Still others complained about the cost to replace damaged licenses. AR 139; *see also* AR 43-51.

In October 2015, the Department publicized a proposed rule that made it mandatory to wear plumber licenses. AR 57, 66. The Department's notice stated that a purpose of the proposed rule was to require the "display of valid plumber certificate of competency." AR 57. The Department held a public hearing and received more comments. AR 101-04, 139, 145, 155.

B. In Response to Public Comment, the Department Changed the Proposed Rule and Issued a Regulation That Encouraged, but Did Not Require, Plumbers to Wear Their License

In April 2016, the Department adopted a final regulation that stated that plumbers were "encouraged to wear" their licenses:

> How should a person performing plumbing wear or visibly display their certification, trainee card, or endorsement?
>
> (1) The certificate must be immediately available for examination at all times.
>
> (2) The individual must also have in their possession governmental issued photo identification.
>
> (3) To work in the plumbing trade, an individual must possess, *and is encouraged to wear*, and visibly display on the front of the upper body a current, valid plumber certificate of competency, medical gas endorsement, or plumber trainee card.
>
> (a) The certificate may be worn inside the outer layer of clothing when outer protective clothing (e.g., rain gear when outside in the rain, arc flash, welding gear, etc.), is required.
>
> (b) The certificate may be worn inside the protective clothing so that when the protective clothing is removed, the certificate is visible. A cold weather jacket or similar apparel is not protective clothing.
>
> (c) The certificate may be worn inside the outer layer of clothing when working in an attic or crawl space or when operating equipment where wearing the certificate may pose an unsafe condition for the individual.

WAC 296-400A-024(3) (emphasis added); *see* AR 107, 122.

In the concise explanatory statement, the Department explained that public comment led it to make the regulation voluntary:

> In response to the comment about concerns the certificate will get lost or damaged and in recognition of comments made during the rule development process, the department changed the wording in WAC 296-400A-024 to encourage rather than require the visible display of a current, valid plumber certificate. The department will evaluate this voluntary approach and see if there is a need for more stringent language in the future.

AR 146. The final regulation became effective on May 16, 2016. AR 107.[2]

C. Harbor Plumbing Filed a Lawsuit Alleging that the Department Did Not Comply with Notice Requirements When It Adopted WAC 296-400A-024 and That RCW 18.106.020, Which Authorized the Regulation, Was Unconstitutional

In March 2016, before the Department had adopted a final regulation, Harbor Plumbing filed a complaint in superior court seeking to enjoin the regulation. CP 99-103. Harbor Plumbing later moved to amend its complaint to add Hired Hands, LLC, an electrical contractor, as a

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[2] Harbor Plumbing ignores that a regulation's effective date is the date specified in the order of adoption. RCW 34.05.380(2). That date is May 16, 2016. AR 107; *see also* RCW 34.05.010(11)(b) (the "order of adoption" is the official written statement by which an agency adopts a rule). Harbor Plumbing instead appears to suggest that the regulation's effective date was March 1, 2016, based on a Department employee's e-mails, information on union websites, and information that "fellow plumbers" purportedly provided to its owner. AB 8; CP 50-58, 60-61. But March 1, 2016, was not the date in the order of adoption. An agency can enforce a regulation only after adoption. So this Court should disregard Harbor's inaccurate characterization that the Department "feign[ed] enforcement" before the effective date of May 16, 2016. AB 21, 24. This Court should also disregard Harbor Plumbing's statements about what "fellow plumbers" purportedly told its owner because it cites counsel's argument, not the record, to support these statements. AB 8 (citing RP 10); *Green v. A.P.C. (Am. Pharm. Co.)*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998) ("Argument of counsel does not constitute evidence.")

plaintiff, apparently to challenge the validity of a rule (WAC 296-46B-940) that required electricians to wear their certificates. CP 109-112. But the trial court denied the motion because Harbor Plumbing's challenge to that rule did not arise out of the same transaction or occurrence as the plumbing regulation. CP 180.

In this appeal, Harbor Plumbing has not assigned error to the trial court's denial of the joinder motion. AB 4-5. Nor has it argued that the trial court's joinder decision was incorrect, instead noting that "[t]he electrician unsuccessfully sought joinder with this case" and that "[j]oinder was denied." AB 1, 9.[3]

After the Department adopted the final plumbing regulation, Harbor Plumbing filed an amended complaint, alleging that the Department did not follow proper rulemaking procedures when it adopted the regulation. CP 3-6. It did not seek relief on the basis that the regulation was "other agency action." CP 3-6. It also sought a declaratory judgment under the UDJA that RCW 18.106.020(1)—the statute that gives

[3] Because Harbor Plumber does not contest the denial of joinder, only the plumbing license display regulation is at issue in this case. This Court should decline to consider Harbor Plumbing's repeated attempts to bootstrap its arguments about the mandatory electrical license display rule, which was authorized by a different statute, for its unsupported assertion that there has been a "systemic bypassing of the APA judicial review process." AB 3-4. As Harbor Plumbing points out, its counsel is currently challenging that rule at superior court. AB 1. That is a different case and has no bearing here.

discretion to the Department to adopt a mandatory license-wearing rule—was unconstitutional. CP 5.

The Department moved to dismiss the rulemaking claim under CR 12(b)(6) and the declaratory judgment claim under CR 12(c). CP 7-19. The superior court granted the motions, finding that the APA claim stated no claim for relief. CP 93-95. In its oral ruling, the superior court concluded that the voluntary regulation was "not a rule under the APA." RP 19. The superior court also concluded that the declaratory judgment action was not justiciable. CP 94. Harbor Plumbing now appeals. CP 306.

IV. STANDARD OF REVIEW

This Court reviews CR 12(b)(6) and CR 12(c) dismissals de novo. *Wash. Trucking Ass'n v. Emp't Sec. Dep't*, 188 Wn.2d 198, 207, 393 P.3d 761 (2017). Dismissal under either subsection is appropriate only when it appears beyond doubt that the plaintiff cannot prove any set of facts that would justify recovery. *Id.*

V. ARGUMENT

Because the Department adopted no rule under the APA when it encouraged plumbers to wear their licenses, the trial court correctly dismissed Harbor Plumbing's claim that the Department violated rulemaking procedures. Under the APA, a regulation is a "rule" subject to the APA's rulemaking procedures if the agency can penalize or sanction

those who violate the rule, or if the rule establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law. But the Department cannot penalize plumbers who ignore the voluntary request in WAC 296-400A-024(3) that they wear their licenses. And the regulation does not impose or alter any requirement on the privilege of holding a plumber's license. So that regulation is not a "rule" under the APA, and the APA's rulemaking procedures do not apply.

The trial court also correctly dismissed Harbor Plumbing's constitutional challenges to RCW 18.106.020(1), which authorizes the Department to adopt a mandatory rule that plumbers wear their licenses. That challenge is not justiciable because the Department did not exercise its discretionary authority under the statute, instead making the license-wearing provision voluntary. Because the Department has not exercised that authority, the statute has not affected Harbor Plumbing's rights, which the UDJA requires. Harbor Plumbing cannot show that the statute creates an actual dispute; therefore, its challenge to the statute is not ripe and is moot. Nor can it demonstrate that the statute harms its direct and substantial interests, as opposed to being rooted in hypothetical harms; therefore, Harbor Plumbing has no standing. Finally, Harbor Plumbing cannot show that its challenge to the statute involves an issue of major

public importance sufficient to trigger the exception to proving justiciability.

A. The Voluntary Regulation Is Not an APA "Rule" Because the Department Cannot Penalize Plumbers If They Choose Not to Wear Their Licenses and Because the Regulation Establishes or Alters No Requirement Under the Law

The Department adopted a voluntary regulation here, not a rule. Under the APA, parties can challenge "rules" on judicial review. RCW 34.05.570(2). But not every regulation is a "rule" under the APA. The Legislature defines "rule" to include a regulation that penalizes or sanctions individuals who violate it or that establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law. RCW 34.05.010(16)(a), (c). The regulation here is not a "rule" because it does not sanction or penalize plumbers who ignore it. Further, it does not impose or alter any requirement on the privilege of holding a plumber's license. Because it is not a "rule," the APA's rulemaking procedures do not apply. Harbor Plumbing's allegation that the Department violated those procedures is not a valid legal claim. The trial court correctly granted the Department's motion to dismiss.

1. The Department did not adopt a "rule" under the APA when it recommended license display

An agency's rule is invalid if the agency adopts the rule without complying with statutory rulemaking procedures. *See* RCW 34.05.570(2)(c).

But as Harbor Plumbing concedes, that statute permits a court to invalidate a rule only if it meets the APA's definition of "rule." AB 37. That is because "it is axiomatic that 'for rule making procedures to apply, an agency action or inaction must fall into the APA definition of a rule.'" *Budget Rent A Car Corp. v. Dep't of Licensing*, 144 Wn.2d 889, 895, 31 P.3d 1174 (2001) (quoting *Failor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wn.2d 488, 493, 886 P.2d 147 (1994)). So when a party challenges an agency's rulemaking procedures, the court must first assess whether the agency action or inaction is a "rule" under the APA. *See Failor's Pharmacy*, 125 Wn.2d at 493-97. If the action is not a rule, rulemaking procedures do not apply. *See id.* at 493.

Appendix A contains the full definition of "rule" in RCW 34.05.010(16). That definition contains five subsections, none of which applies here. Harbor Plumbing does not argue that any of the five subsections applies. AB 34-47. None does, because the voluntary license-wearing regulation does not subject violators to a penalty or sanction (subsection a); does not affect the agency hearing process (subsection b); does not establish, alter, or revoke any qualification or standard concerning benefits or privileges (subsection c) or any qualification or standard for the issuance, suspension, or revocation of licenses (subsection

d); and does not affect standards for selling products or materials (subsection e).

The suggestion in WAC 296-400A-024(3) that plumbers wear their licenses is not a rule because there is no penalty or sanction for noncompliance. A plumber can disregard the suggestion without legal consequence. Nor does WAC 296-400A-024(3) establish or alter any requirement about the privilege of holding a plumber's license since the regulation imposes no requirement at all.

When read as a whole, it is clear that WAC 296-400A-024(3) makes it voluntary to wear a plumbing license. Harbor Plumbing does not argue otherwise, and it noted in its amended complaint that the regulation was "not mandatory in final form." CP 4. Although a misplaced comma in WAC 296-400A-024(3) after the word "wear" (instead of after the word "body") might suggest that an individual must "visibly display on the front of the upper body a current, valid plumber certificate of competency, medical gas endorsement, or trainee card," that would be an incorrect reading of the regulation. That is because visibly displaying the license on the front of the upper body is the same as "wearing" the license and, under the regulation, plumbers are only "encouraged to wear" a license. A regulation cannot make something both mandatory and voluntary. To the extent that the misplaced comma creates an ambiguity, this Court may look to outside sources such as the legislative history to determine the agency's intent, and this Court defers to an agency's

interpretation of its own regulation. *Clark v. City of Kent*, 136 Wn. App. 668, 672, 150 P.3d 161 (2007); *see also Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004) ("deference to an agency's interpretation of its own regulations is also appropriate.") Here, the Department explained in the concise explanatory statement that the final regulation did not require plumbers to wear their licenses: "In response to the comment about concerns the certificate will get lost or damaged and in recognition of comments made during the rule development process, the department changed the wording in WAC 296-400A-024 *to encourage rather than require the visible display of a current, valid plumber certificate*." AR 146 (emphasis added). Because the voluntary regulation is not a "rule" under the APA, the APA's rulemaking requirements—including the notice requirements in RCW 34.05.320—do not apply.

Harbor Plumbing appears to concede that WAC 296-400A-024(3) is not a "rule" when it acknowledges that, at the trial court, it "abstained from arguing that a 'non-rule' is a rule." AB 36. That concession is fatal. If an agency action is not a rule, it is "axiomatic" that rulemaking procedures do not apply. *Budget Rent A Car Corp.*, 144 Wn.2d at 895. For agency rulemaking procedures to apply, "an agency action or inaction must fall into the APA definition of a rule." *Failor's Pharmacy*, 125

Wn.2d at 493. Because they do not apply here, Harbor Plumbing's challenge fails under CR 12(b)(6).

Despite Harbor Plumbing's concession and its repeated characterization of WAC 296-400A-024(3) as a "non-rule," Harbor Plumbing then raises three new arguments on appeal to suggest, inconsistently, that the voluntary license requirement might be a rule. AB 37-38. First, it invites this Court to ignore the statutory definition of "rule" and conclude that anything "added to the WAC" is a rule. AB 37. Second, it suggests that the voluntary regulation could be a rule because it is "substantively equivalent" to an amendment of an existing rule, and the APA includes "the amendment . . . of a prior rule" in the definition of "rule." AB 37; RCW 34.05.010(16). Third, it implies that "[t]he ratio of permissive to commanding language" in WAC 296-400A-024(3), or in WAC 296-400A-024 as a whole, converts the voluntary license provision into a mandatory one. AB 38. Because Harbor Plumbing did not present these arguments to the trial court, this Court should decline to consider them now. *See* RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009) (court does not consider arguments raised for the first time on appeal). Even if this Court considers them, none is correct.

The first new argument on appeal fails because appellate courts do not add words to statutes. *City of Seattle v. Fuller*, 177 Wn.2d 263, 269,

300 P.3d 340 (2013). This Court cannot, as Harbor Plumbing invites, read "something like 'that which has been proposed, promulgated, and added to the WAC'" into the APA's definition of "rule." AB 37. Reading this language into RCW 34.05.010(16) would commandeer the Legislature's definition of "rule," transforming every provision of the Washington Administrative Code—even those that encourage behavior without imposing a penalty or sanction for noncompliance—into a rule. But this Court "must not add words where the legislature has chosen not to include them." *Fuller*, 177 Wn.2d at 269. Only regulations that "fall[] within the statutory definition of a rule" are treated as rules. *Hunter v. Univ. of Washington*, 101 Wn. App. 283, 289, 2 P.3d 1022 (2000). Had the Legislature wanted every WAC provision to be a "rule" subject to rulemaking procedures, it would have said so. It did not. Instead, it required agencies to follow statutory rulemaking procedures only when taking actions with certain consequences, including when creating a penalty or sanction by rule. The regulation here, which merely encourages voluntary license-wearing, does not do that.

The second new argument fails because the voluntary license-wearing provision is a new regulation, not an "amendment . . . of a prior rule" under RCW 34.05.010(16). Before the Department adopted the voluntary license-wearing regulation, the Washington Administrative

Code was silent on the issue of displaying plumbing licenses. Harbor Plumbing even concedes that because WAC 296-400A-024(3) "is a new (as opposed to 'amendatory') section," the interpretation it advances here—that the license-wearing provision is an amendment of a prior rule—"might not reach it." AB 37. Harbor Plumbing is correct to recognize its own argument as untenable. That is because the new license-wearing regulation amends no previous rule about displaying licenses.

Harbor Plumbing is wrong to suggest that the voluntary license-wearing provision amends the regulation that requires inspectors to confirm that plumbers possess their license and identification. AB 37 n.7 (citing WAC 296-400A-140(1)). Adding a non-mandatory suggestion that plumbers can wear their licenses does not change the inspector's duties to confirm that plumbers have these documents, or the inspector's ability to issue a citation if they do not. WAC 296-400A-140(1); RCW 18.106.020(1), (5). Nothing in WAC 296-400A-024(3) changes that.

The third new argument about the "[t]he ratio of permissive to commanding language" fails because it ignores the regulation's plain language, which makes wearing the license voluntary. This Court must apply a regulation's plain language, if unambiguous. *Demetrio v. Sakuma Bros. Farms*, 183 Wn.2d 649, 655, 355 P.3d 258 (2015). The regulation here states that plumbers are "encouraged to wear" their licenses. WAC

296-400A-024(3). This is unambiguously voluntary. That the two preceding subsections impose other requirements on plumbers—specifically, that they possess their license and identification—does not make it mandatory that they wear their licenses.

The mandatory language in these two subsections also does not convert WAC 296-400A-024 into a rule. It is true that the Department may issue a penalty to a plumber who does not have a certificate available for immediate examination or who does not possess photo identification. But that penalty arises from a statute, not from WAC 296-400A-024(1) and (2). Under RCW 18.106.020(1), no person may engage in the trade of plumbing "without having a journey level certificate, specialty certificate, temporary permit, or trainee certificate and photo identification in his or her possession." And the Legislature makes a penalty mandatory in cases of noncompliance: "If the individual fails to comply with this section, the department shall issue a penalty or penalties as authorized by this chapter." RCW 18.106.020(1); *see also* RCW 18.106.270(1) (penalties for violations of RCW 18.106.020 are mandatory).

The first two subsections of WAC 296-400A-024 thus do not subject plumbers to a penalty or sanction—it is the Legislature, not the Department, in RCW 18.106.020(1) that established the consequences for failing to possess a license and identification. Because those two

subsections do not subject plumbers to a penalty or sanction, they are not rules under the APA. Harbor Plumbing therefore cannot rely on these two subsections to assert that mandatory language throughout WAC 296-400A-024 converts that regulation into a rule.

Also, the requirement that plumbers possess their certificate and identification already appeared in the Washington Administrative Code before the Department adopted WAC 296-400A-024. The existing regulation about job-site inspections stated that the Department's representative must determine whether "[e]ach person doing plumbing has their department issued certification card and governmental issued photo identification in their possession on the job site." Former WAC 296-400A-140 (2010). And, consistent with RCW 18.106.020(1), the existing regulation about issuing infractions stated that the Department could issue an infraction to "[a]n individual for not having their department issued certification card and governmental issued photo identification in their possession on the job site. WAC 296-400A-300(2)(d). Those requirements still exist today, but the Department has now added similar language to subsections (1) and (2) of WAC 296-400A-024 because that section specifically addresses how to display the certificate, should a plumber choose to do so. WAC 296-400A-024, -140, -300(2)(d). The two requirements in WAC 296-400A-024(1) and (2) already existed before the

Department adopted the voluntary regulation in subsection (3), and they are not at issue in these proceedings. *Contra* AB 37-38.

Possession of the license and identification is mandatory while wearing the license is optional. This Court should reject Harbor Plumbing's request to ignore WAC 296-400A-024's plain language. Nor does a reasoned basis exist to support Harbor Plumbing's argument that all subsections in a single regulation must be rules or none of them is a rule. *Contra* AB 37-38. What makes a regulation a "rule" under the APA is whether it fits the Legislature's definition. The voluntary license-wearing provision in WAC 296-400A-024(3) is not a rule.

2. The APA's rulemaking procedures are not mandatory if an agency adopts no rule, even if the agency initially proposes a rule

An agency need not follow rulemaking procedures if it adopts no rule. Harbor Plumbing is incorrect that the APA's statutory rulemaking procedures still apply even when an agency starts rulemaking but then decides not to adopt a rule. AB 36. Agency rulemaking procedures apply only when "an agency action or inaction [falls] into the APA definition of a rule." *Budget Rent A Car Corp.*, 144 Wn.2d at 895 (quoting *Failor's Pharmacy*, 125 Wn.2d at 493). What controls is whether the agency's final decision is a "rule," no matter what other proposals the agency has considered.

It makes sense that a rule requires adherence to rulemaking procedures while a voluntary regulation does not. A rule can have a substantial impact on an individual's life. It can impose a penalty, revoke a benefit, or alter the individual's ability to engage in a specific trade by changing licensing requirements. *See* RCW 34.05.010(16). Because a rule can have these effects, the public needs notice of the rule's purpose and anticipated effects and an opportunity to comment about the rule's wisdom or its shortcomings. *See* RCW 34.05.320. The stakes are lower for a regulation that imposes no requirements or penalty for non-compliance.

Harbor Plumbing fails to discern the reality that agencies routinely adopt regulations that encourage a certain action but do not require it. Its claim that "no other example of an advisory section" exists in the Washington Administrative Code is perplexing as a cursory review reveals otherwise. AB 2. To provide just three illustrations of regulations that encourage but do not require behavior:

- All school districts that do not offer a school lunch program "are encouraged to implement such a program" and all school districts "are encouraged to provide a breakfast program in all severe need schools as they become eligible." WAC 392-157-120.

- Student bicyclists at Western Washington University "are encouraged to wear helmets, use lights, and avoid distractions" like cell phone use. WAC 516-13-080(3).
- A spirit retail licensee is "encouraged" to list the name of the person who delivers the spirits on sales records. WAC 314-03-030(10)(c).

Dozens more examples exist.

The voluntary license-wearing regulation follows in this tradition. It is not a "new species" of regulation. AB 1. It is not a "mutation of" or "blemish on" the Washington Administrative Code. AB 22, 30. Like many other regulations, it attempts to advance a public policy without penalizing people who do not follow its lead.[4]

3. Even though the Department did not need to comply with rulemaking procedures, it did

In any case, the Department complied with rulemaking procedures, although this Court does not need to reach that issue. Harbor Plumbing appears to suggest that the Department violated rulemaking procedures because it did not adequately summarize its proposed rule under RCW

[4] As Harbor Plumbing recognizes, the APA encourages agencies to advise the public of its current opinions, approaches, and likely courses of action in interpretive or policy statements, which should be published in the Washington State Register. AB 40; RCW 34.05.230(1), (4). But that does not mean, as Harbor Plumbing seems to imply, that an agency cannot adopt a voluntary regulation after going through rulemaking. AB 40-41. As previously noted, many regulations encourage but do not mandate certain actions.

34.05.320, which requires a description of the rule's purpose. AB 6. But even though the APA's notice requirements do not apply, the Department complied with those notice requirements, including by identifying the proposed regulation's purpose, as the APA requires. AR 57; RCW 34.05.320(1)(a), (c).

The Department notified the public that one purpose of the rule was to require "display of valid plumber certificate of competency." AR 57. Even though the notice did not use the word "wear," this provided sufficient notice to the public that plumbers might be required to display their licenses by wearing them. Wearing is a form of display.

Harbor Plumbing is also wrong that the Department did not comply with rulemaking procedures because the rule proposal summary "glossed the rulemaking as 'housekeeping'." AB 43 n.9. To the contrary, the purpose section in the proposed rulemaking notice informed the public that it was considering a requirement that plumbers display their licenses:

> Proposed rule changes being put forward include:
>
> - Amending the rule to be consistent with the national consensus code
> - Establishment of a requirement for display of valid plumber certificate of competency; and
> - General housekeeping changes

AR 57. This put the public on notice that the Department was considering such a requirement.

Because this Court can affirm on any grounds supported by the record, even if the Court decides that WAC 296-400A-024(3) is a rule, it should affirm the trial court because the Department complied with the APA's rulemaking procedures. *See State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004) (An appellate court may affirm a superior court's decision on any legal ground supported by the record, even if different from the basis for the lower court's ruling).

4. The Department's voluntary regulation responded to public comment and will benefit the public, not harm it

The Department's adoption of a voluntary regulation protects the integrity of the plumbing trade at no one's expense. The regulation follows the Legislature's intent to "address the problems of the underground economy in the construction industry, level the playing field for honest contractors, and protect workers and consumers." Laws of 2009, ch. 36, § 1. It accomplishes these goals by encouraging plumbers to openly display their professional credentials to consumers. And because the regulation is voluntary, it imposes no more costs on the approximately 8,000 plumbers in the State. *See* AR 95, 151-52. This case is a far cry from the Legislature potentially forcing "millions of private Washingtonians to wear licenses,"

as Harbor Plumbing proclaims. AB 26. It involves 8,000 plumbers who can decide whether they want to wear their license.

Consumers have a right to know if their plumber is a licensed professional, and encouraging plumbers to display their license helps accomplish that goal. And the Department's rejection of a mandatory rule reflects careful consideration of competing interests. During public comment, some individuals opposed a mandatory rule for cost and safety reasons. AR 139, 146; *see also* AR 43-51. But others supported the rule to ensure consumers' health and safety:

> The ability of consumers and compliance [sic] to be able to easily and positively identify tradespeople who have followed the spirit and intent of the statute is a move in the right direction. We have always viewed the plumbing certification statute as instituted to ensure that the health and safety of Washington citizens is protected by mandating that sanitary systems are installed by trained and certified individuals. This change also brings positive recognition on multiple levels to the important role that plumbing plays in protecting Washington's citizens.

AR 155. Indeed, commercial plumbers believed a mandatory rule would reduce unfair competition with non-licensed plumbers. AR 83, 139. The Department resolved these competing views by encouraging plumbers to wear their licenses but not mandating that they do so.

Inherent in rulemaking is the possibility that the agency will change, reconsider, or withdraw the proposed rule it presents to the public.

Harbor Plumbing accuses the Department of "brinksmanship" and a "last minute, evasive codification of a non-rule" because it made the requirement voluntary. AB 20. It chides the Department for "erratic behavior" because it changed its mind. AB 46. But this is how rulemaking works. Rulemaking requires an agency to solicit and consider public comment. *See* RCW 34.05.310, .320, .325. Stakeholders should have a say in rules that affect them, and agencies should consider their input, not ignore it. Here, because plumbing industry members expressed safety and cost concerns about a mandatory rule, the Department considered that input and made the regulation voluntary. This was a reasonable and responsible way to respond to public comment.

The Department's responsiveness to public comments was not a "gambit," was not "evasive," was not a "last-minute change," and was not "brinksmanship." AB 20, 25, 26. It reflected consideration of others' opinions. The Department took several months to consider the proposed rule and when it changed the proposed rule into a voluntary regulation, it did so based on public comment. As the trial court aptly observed about this decision, "It looks to me like that's exactly what the APA contemplates which is sometimes the agency considers input and decides on a different course." RP 21.

5. Harbor Plumbing has waived the argument that the voluntary regulation is "other agency action" and this argument is also untimely

Because WAC 296-400A-024(3) is not a rule, the only potential basis for this Court to review it is as "other agency action" under RCW 34.05.570(4). The Court should reject Harbor Plumbing's belated attempt to argue that the regulation should be reviewed as "other agency action." AB 39. Harbor Plumbing's amended complaint did not argue this ground for relief, and so the issue is not before this Court. CP 4-6; *See Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 352, 144 P.3d 276 (2006) (declining to consider a new argument on appeal that was not raised in an amended complaint because the plaintiff's failure to allege it in the amended complaint did not give the defendant fair notice of the claim).[5]

Harbor Plumbing tries to circumvent this problem by citing the leniency of notice-pleading requirements.[6] AB 39-40. But, even under notice pleading, a party must plead the cause of action. Complaints that

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[5] As part of its "other agency action" argument, Harbor Plumbing suggests that the license-wearing regulation is a statute. AB 38. A statute is a "law passed by a legislative body." Black's Law Dictionary 1633 (10th ed. 2012). Agencies cannot enact statutes, so Harbor Plumbing's suggestion that the license regulation "may fit the definition of 'statute'" fails. AB 38 (quoting RCW 34.05.010).

[6] At various points in its brief, including when discussing notice pleading, Harbor Plumbing challenges the trial court's comments during oral argument. AB 40; *see also* 9, 12, 24, 36. But an oral decision has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment. *State v. Mallory*, 69 Wn.2d 532, 533, 419 P.2d 324 (1966).

fail to give the opposing party fair notice of the claim asserted are insufficient. *Pac. Nw. Shooting Park Ass'n*, 158 Wn.2d at 352. Harbor Plumbing did not assert in its amended complaint, which it filed more than a month after the regulation's effective date, that the regulation was "other agency action." *See* CP 3-6. If it had, the Department would have responded to that argument and the trial court would have had a chance to consider the parties' arguments on that cause of action. Instead, Harbor Plumbing limited its cause of action to a rulemaking challenge, which is a cause of action under RCW 34.05.570(2), not under RCW 34.05.570(4). CP 5.

Nor did Harbor Plumbing preserve the "other agency action" argument through comments that it made at oral argument on the motion to dismiss. AB 40 (citing RP 11, 14). By stating that it was "not sure" whether the voluntary regulation was a rule or other agency action, it did not make an affirmative argument that the regulation was other agency action. RP 14. Nor did Harbor Plumbing identify any basis for relief under RCW 34.05.570(4)(c)—i.e. it did not argue that the voluntary license-wearing regulation was unconstitutional, outside the agency's statutory authority, arbitrary or capricious, or taken by an agency official not authorized to take such action. *See* RP 11, 14. Harbor Plumbing also did not identify a basis for relief under RCW 34.05.570(4)(c) when it stated,

"It's either a rule, an order, probably not, or other agency action, I can see that." RP 11. Suggesting that a legal argument is plausible is not the same as asserting it. Harbor Plumbing's passing mention of "other agency action" at oral argument, without more, did not preserve the argument. There must be "more than a hint or a slight reference to an issue" to preserve an issue for review. *See B & R Sales, Inc. v. Dep't of Labor & Indus.*, 186 Wn. App. 367, 382, 344 P.3d 741 (2015) (failure to adequately argue issue at fact-finder level waives issue).

But even if Harbor Plumbing did not waive the "other agency action" argument, that argument is untimely. "A petition for judicial review of agency action other than the adoption of a rule or the entry of an order is not timely unless filed with the court . . . within thirty days after the agency action." RCW 34.05.542(3). If Harbor Plumbing believed the regulation was "other agency action," it had 30 days to challenge it. *Wells Fargo Bank, N.A. v. Dep't of Revenue*, 166 Wn. App. 342, 354–55, 271 P.3d 268 (2012). It failed to do so. It did not amend its complaint within 30 days of the regulation's effective date to include this cause of action. *See* CP 4-6. Any argument on this cause of action is untimely.

B. Harbor Plumbing's Constitutional Claims About a Statute's Potential Problem Do Not Present a Justiciable Controversy or Raise an Issue of Major Public Importance

Harbor Plumbing's constitutional challenge to RCW 18.106.020(1) is nonjusticiable. That statute does not require the Department to adopt a mandatory license-wearing rule, and the Department has decided not to exercise its authority under the statute to adopt a mandatory rule. Instead, the Department adopted a voluntary regulation that Harbor Plumbing can ignore if it wishes. Harbor Plumbing fails to present an actual dispute in which it has a direct and substantial interest, as the UDJA requires for all parties before they can challenge a statute's constitutionality.

Harbor Plumbing cannot meet the justiciability requirements to challenge RCW 18.106.020(1)'s constitutionality through a declaratory judgment action. Under the UDJA, only a person "whose rights, status, or other legal relations are affected by a statute" may have determined "any question of construction or validity arising" under a statute. RCW 7.24.020. Absent an issue of broad overriding public import, a party cannot invoke the court's jurisdiction under the UDJA unless there is a justiciable controversy. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001). To prove justiciability, a party must satisfy each of these four prongs:

1. an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement;

2. a dispute between parties having genuine and opposing interests;

3. a dispute that involves direct and substantial interests, rather than potential, theoretical, abstract, or academic ones; and

4. a dispute which can be resolved in a final and conclusive way through a judicial determination.

Walker v. Munro, 124 Wn.2d 402, 411-12, 879 P.2d 920 (1994).

Inherent in these four requirements are the traditional limiting doctrines of ripeness, mootness, and standing. *To-Ro Trade Shows*, 144 Wn.2d at 411. The first prong addresses ripeness and mootness. *See Lee v. State*, 185 Wn.2d 608, 617, 374 P.3d 157 (2016). The third prong encompasses standing. *To-Ro Trade Shows*, 144 Wn.2d at 414.

Harbor Plumbing's constitutional claims fail to satisfy the first and third prongs, and the major public importance exception does not apply. First, under the first prong, its claim is not ripe because there is no actual dispute when the Department has not exercised its authority under the statute to penalize plumbers for not wearing licenses. Second, also under the first prong, the action is moot because the Department adopted a voluntary regulation instead of a mandatory one, and no exception to mootness applies. Third, under the third prong, Harbor Plumbing has no standing because it cannot show that the statute affects its direct and substantial interests. It cannot show injury when it can ignore the regulation without consequence. Fourth, Harbor Plumbing fails to

establish that its claims present an issue of broad overriding public import such that it need not establish the justiciability requirements.

1. The action is not ripe: the agency has chosen not to take the questioned action so there is no actual dispute or the mature seeds of a controversy

Harbor Plumbing fails the first prong of justiciability. Its constitutional claims are not ripe because they are predicated on potential harm, assuming the Department could sometime in the future exercise its full rulemaking authority, even though it did not exercise such authority.

Harbor Plumbing argues that the mere existence of the statute creates an actual dispute because it confers power on the Department to adopt a mandatory rule, and "to confer power is to create actual dispute." AB 13. But a statute containing the word "may" in delegating authority does nothing until the government actually exercises the discretionary authority. *See Grandmaster Sheng-Yen Lu v. King Cty.*, 110 Wn. App. 92, 38 P.3d 1040 (2002) (holding that the question on what type of permit was required for mining operations was not ripe given that the County had not determined what permit it would require). Unless actualized, discretionary power creates only a hypothetical dispute, not one that satisfies the first prong of justiciability.

The Department created no enforceable rule requiring plumbers to visibly display or wear their licenses. WAC 296-400A-024(3). Harbor

Plumbing points to the Department's initial draft of a mandatory rule to show there is a dispute. AB 5, 13. But the Department did not adopt such a rule, so there is not anything to dispute. For the same reason, Harbor Plumbing's argument that an actual dispute arises "the moment the enabled rulemaking begins" because "the power of the enabling statute had been invoked" is baseless. AB 5, 13. Rulemaking does not always end in a rule. A dispute must be "present and existing" to be justiciable. *Walker*, 124 Wn.2d at 411. If the regulation does not mandate license-wearing, there is no present and existing dispute about a mandatory license-wearing requirement. Harbor Plumbing can just ignore the Department's recommendation. Because the Department cannot enforce a voluntary provision, Harbor Plumbing's concern that "the Department has and will devote resources to enforcing an unconstitutional rule" has no basis in reality or law. AB 17.

Harbor Plumbing also repeatedly invokes a different rule that requires electricians to wear their license as evidence to support its contention. AB 14, 15, 17, 18. But because Harbor Plumbing has not challenged the superior court's denial of joinder in the case involving the electrical rule, this Court should not consider arguments about that rule. And, under the standing doctrine, Harbor Plumbing cannot raise

electricians' or any third party's legal rights as to the constitutionality of RCW 18.106.020(1). *See Walker*, 124 Wn.2d at 419.

Speculation on an agency's future actions creates no present dispute or a ripe matter since the Department might never require plumbers to wear or visibly display their licenses. *See Lee*, 185 Wn.2d at 617; *see also Lawson v. State*, 107 Wn.2d 444, 446, 460, 730 P.2d 1308 (1986) (court found no actual and present dispute where County had no present intent to take the challenged action). Harbor Plumbing's contention that it must "keep[] vigil over" future Department rulemaking is not comparable to cases like *Clallam County*, where the Court identified the existence of a real dispute between overlapping and conflicting personnel systems in an ordinance and a statute. *Clallam Cty. Deputy Sheriff's Guild v. Bd. of Clallam Cty. Comm'rs*, 92 Wn.2d 844, 848-49, 601 P.2d 943 (1979); AB 25. That case is inapplicable and does not aid Harbor Plumbing.

Instead, Harbor Plumbing's constitutional claims are like those in *Lewis County*, where the court rejected a dispute about whether the State should be responsible for tort claims against county judicial employees as unripe because no lawsuit was pending or being threatened against the county. *Lewis Cty. v. State*, 178 Wn. App. 431, 437, 315 P.3d 550 (2013). The Court thus held that the county presented a hypothetical or speculative

dispute. *Id.* Similarly, because the Department has not exercised its authority under RCW 18.106.020(1) regarding plumbers' licenses, any dispute is speculative. Harbor Plumbing cannot assert the rights of those working in other trades as a basis for challenging the statute where the Department has not adopted a rule regarding plumbers' licenses under RCW 18.106.020(1).

There are no "mature seeds" to a dispute here either, contrary to Harbor Plumbing's arguments, because the Department may never exercise its discretion under the statute to make it mandatory for plumbers to wear their licenses. *Contra* AB 14-19. So the cases Harbor Plumbing cites for its "mature seeds" analysis do not support it. AB 14-19. For example, the statute that the homeless children challenged in *Washington State Coal. for the Homeless v. Dep't of Soc. & Health Servs.*, 133 Wn.2d 894, 916, 949 P.2d 1291 (1997), presently affected them if they were in dependency proceedings. But RCW 18.106.020(1) does not affect Harbor Plumbing because the Department has not adopted a mandatory rule. Instead, Harbor Plumbing is like the landowners in *Lawson*, who could not establish the mature seeds of a dispute when they could not show that the county intended to take an action that the challenged statute allowed (taking their land without compensation). 107 Wn.2d at 445, 460. The landowners' concern was speculative, as is Harbor Plumbing's here.

Because the Department has chosen not to exercise its authority for plumbers under the statute, Harbor Plumbing cannot demonstrate a ripe dispute. There is no dispute because the discretion has not been exercised and plumbers can disregard the voluntary regulation.

2. The action is moot: no exception to mootness applies to speculative constitutional challenges

Because Harbor Plumbing's challenge to the statute is not ripe, its challenge fails the first prong of justiciability, and this Court should affirm the Court's dismissal on that basis alone. Under the first prong of justiciability, a claim also must not be moot for there to be an actual dispute the Court can consider. Harbor Plumbing appears to ask this Court to consider its challenge under exceptions to the mootness doctrine, after conceding that the Department's adoption of a voluntary regulation "mooted the original . . . constitutional claims." AB 31-34. These exceptions do not apply. And even if Harbor Plumbing can show its challenge is not moot, the challenge is still unripe.

Issues become "moot when the court can no longer provide effective relief." *Brown v. Vail*, 169 Wn.2d 318, 337, 237 P.3d 263 (2010). Once a claim is moot, the court has the discretion to decide an appeal if the question is one of continuing and substantial public interest. *State v. Beaver*, 184 Wn.2d 321, 330, 358 P.3d 385 (2015).

As Harbor Plumbing appears to concede, its constitutional claims became moot when the Department adopted a voluntary regulation. AB 31. And Harbor Plumbing fails to show an issue of continuing and substantial public interest.

Courts consider three prongs in determining whether a moot case involves a question of continuing and substantial public interest: "(1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for the future guidance of public officers, and (3) the likelihood of future recurrence of the question.'" *In re Pers. Restraint of Mattson*, 166 Wn.2d 730, 736, 214 P.3d 141 (2009) (quoting *Sorenson v. City of Bellingham,* 80 Wn.2d 547, 558, 496 P.2d 512 (1972)).

This case involves no claim of continuing and substantial public interest. On the first prong, the statute does not affect the public at large, but only the private interest of about 8,000 plumbers, and only when the Department exercises its authority under the statute, which it has not. An opinion as to the constitutionality of a statute that applies only to plumbers does not create a continuing and substantial public interest. *See In re Marriage of Horner*, 151 Wn.2d 884, 892, 93 P.3d 124 (2004) (finding that the issue presented was one of a public nature given that the opinion would be applicable beyond the facts presented). Harbor Plumbing's argument that the public's interest in its claims exceed the public's interest

in knowing whether courts can discretionarily confine runaway children exaggerates RCW 18.106.020(1)'s impact on plumbers who may never be required to wear their licenses. AB 33 (citing *In re Dependency of A.K.*, 162 Wn.2d 632, 643-44, 174 P.3d 11, 17 (2007)). On the second prong, there is no need for an authoritative determination about the statute's constitutionality because the Department may never exercise its authority under it. And on the third prong, Harbor Plumbing's assumption that the issue will recur is speculative and unsupported.

Harbor Plumbing's attempt to bootstrap the rights of "every adult member of the public [that] is licensed by one agency or another" exponentially broadens the applicability of RCW 18.106.020(1), which applies only to plumbers. *See* AB 33. And its attempt to piggyback on the rights of electricians who operate under a different statute and mandatory license-wearing rule does not support finding that its constitutional challenges in this case trigger the exception. Electricians can raise such arguments in the other case currently at superior court. Because Harbor Plumbing's future guidance and recurrence arguments hinge on the interpretation that RCW 18.106.020(1) applies or could apply in all licensing contexts, it fails to satisfy the last two prongs of the continuing and substantial public interest exception. *See* AB 33-34. As a result,

Harbor Plumbing's constitutionality claims are moot and are therefore nonjusticiable.

This Court should also reject Harbor Plumbing's request to review its challenge to RCW 18.106.020(1) because the statute's implementation is "capable of repetition, yet evading review." AB 4, 5, 31. That exception to mootness requires that (1) the challenged action was so short in duration that it could not be fully litigated before its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. *In re Marriage of Horner*, 151 Wn.2d 2d at 893 n.8. Harbor Plumbing does not have a reasonable expectation that the Department will exercise its authority under the statute to adopt a mandatory license-wearing rule. The Department has adopted a voluntary rule after considering public comment. So Harbor Plumbing cannot establish this exception to mootness.

3. Harbor Plumbing has no standing: no direct and substantial interests are affected by an enabling statute that allows the Department to exercise discretion in rulemaking

Harbor Plumbing fails to identify how RCW 18.106.020(1) harms any direct and substantial interests. This prong encompasses the traditional doctrine of standing. *To-Ro Trade Shows*, 144 Wn.2d at 414. To demonstrate standing to challenge the constitutionality of RCW

18.106.020(1), Harbor Plumbing must show it suffered an injury and the interest it seeks to protect is within the zone of interest protected by the statute. *Id.* at 414.

Harbor Plumbing has not identified a concrete injury stemming from RCW 18.106.020(1) or from the Department's later regulation.[7] It asserts that the statute infringes its constitutional right to equal protection, privacy, speech, bodily autonomy, and choice of appearance. AB 19-20. But should its plumbers choose not to wear the license, as they may under the regulation, none of these constitutional rights will be affected. Harbor Plumbing provides no coherent argument on how the statute, which only allows the Department to choose whether to adopt a rule, violates the constitution even if the Department never exercises its authority under the statute to adopt a mandatory license-wearing rule. If the Department never does, Harbor Plumbing will never be injured. Such "naked castings into the constitutional sea are not sufficient to command judicial consideration

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[7] Harbor Plumbing referenced standing in its analysis of the first prong of justiciability, citing to *Benton County. v. Zink*, 191 Wn. App. 269, 361 P.3d 801 (2015), *review denied*, 185 Wn.2d 1021, 369 P.3d 501 (2016). AB 16-17. In *Benton County*, the court recognized that the county suffered an injury stemming from a threat of litigation under the Public Records Act given precedent establishing that financial and administrative burdens on agencies constitute injury. *Id.* at 279-80. Declaratory judgment was appropriate in that case because the county had to respond to a public records request and a determination of its duties to respond to that request under the Public Records Act would avoid delay and financial penalty. *Id.* Harbor Plumbing is not an agency nor would declaratory judgment in this matter avoid delay and financial penalty to Harbor Plumbing's interests.

and discussion." *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970).

Under the regulation that the Department actually adopted, Harbor Plumbing's employees need not wear their plumbing licenses if they do not want to. *See* WAC 296-400A-024(3); *Washington Educ. Ass'n v. Washington State Pub. Disclosure Comm'n*, 150 Wn.2d 612, 623, 80 P.3d 608 (2003) (finding that because the guidelines at issue had no legal or regulatory effect, issuing the guidelines did not implicate the plaintiff's actual or direct interests). Plumbers do not face an actual threat that the Department will adopt a rule requiring plumbers to wear or visibly display their licenses in the future. None of Harbor Plumbing's employees has received a citation or penalty for not wearing their licenses. *See Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus.*, 121 Wn. App. 601, 607, 89 P.3d 316 (2004) (holding that plaintiff lacked standing to challenge regulation because it had never been issued a citation despite threat of future citations).

Harbor Plumbing asserts that it satisfies the third justiciability prong by relying on the statement in *De Cano v. State*, 7 Wn.2d 613, 616, 110 P.2d 627 (1941), that an individual may not challenge a statute's constitutionality unless "it appears that [the plaintiff] will be directly damaged in person or in property by its enforcement." But, at this time,

enforcement of the statute cannot directly damage Harbor Plumbing or its property interests. There is no way to enforce RCW 18.106.020(1) because it merely delegates discretion to the Department, which the Department has not exercised.

This contrasts with the situation in *De Cano.* There, the Court found a direct interest when the challenged statute allowed the government to take land owned by a non-citizen. *De Cano*, 7 Wn.2d at 615-16. But the Court found the statute did not directly affect or threaten a corporation of non-citizen members because the corporation had no current interests in land. *Id.* at 615-17.

Similarly, Harbor Plumbing does not have an interest that is or will be affected by a statute resulting in a non-mandatory regulation. Harbor Plumbing argues the statute could affect its interests at some indeterminate time if the Department exercises its full discretion but, like the corporation in *De Cano*, Harbor Plumbing offers a speculative prediction about the future that fails to meet the requirements of justiciability. *Id.* at 617.

Harbor Plumbing has failed to identify a realistic or actual injury stemming from RCW 18.106.020(1). Alleging injury to electricians under a separate statute cannot circumvent the applicability of the limiting doctrine of standing to Harbor Plumbing, which has failed to establish that it has suffered harm to its direct or substantial interests. Nor is it sufficient

that Harbor Plumbing "anticipates" that the Department will make a license-wearing requirement mandatory, as it has for electricians. AB 20. Anticipation is not injury. Further, Harbor Plumbing's anticipation is speculative as it ignores that the Department made the regulation voluntary based on industry-specific comments from plumbers. Finally, retaining counsel "to investigate whether the rule was . . . applicable" was a choice Harbor Plumbing made, not an injury it incurred. *Contra* AB 24. Because Harbor Plumbing has failed to satisfy prongs one and three of the justiciability analysis, its claim is nonjusticiable and the trial court correctly dismissed its claim under CR 12.[8]

4. There is no issue of major public importance: the agency has only unexercised discretion, which implicates nothing

Harbor Plumbing also cannot escape its failure to present a justiciable controversy by falling back on the "major public importance" exception to justiciability. When a party cannot meet each of the four prongs of justiciability, courts seldom step into the prohibited area of advisory opinions and will only deliver advisory opinions on rare

[8] This Court should disregard Harbor Plumbing's suggestion that the Department had to provide a supplemental notice and comment period under RCW 34.05.340(1) because the final regulation was "substantially different" than the proposed rule. AB 20-21. Harbor Plumbing did not argue for this remedy in its complaint, and the final regulation is not "substantially different" from the proposed rule just because it is not mandatory. *See* CP 3-6.

occasions where the public's interest in resolving an issue is overwhelming, and where the parties have adequately briefed and argued the issue. *To-Ro Trade Shows*, 144 Wn.2d at 416; *Lewis Cty.*, 178 Wn. App. at 437, 440. This is not such a case.

Claiming infringement of constitutional rights, by itself, does not automatically characterize an issue as being one of major public importance. *DiNino v. State ex rel. Gorton*, 102 Wn.2d 327, 332, 684 P.2d 1297, 1301 (1984). Harbor Plumbing must show that the "public interest would be enhanced by reviewing the case." *Snohomish Cty. v. Anderson*, 124 Wn.2d 834, 841, 881 P.2d 240 (1994).

Harbor Plumbing tries to establish the major public importance exception by exaggerating both the reach of its challenge and the impact of wearing professional credentials.[9] Should the Department ever exercise its authority to adopt a mandatory rule under RCW 18.106.020(1), it would affect about 8,000 plumbers. It would not affect "millions of private Washingtonians" because RCW 18.106.020(1) authorizes no mandatory rule about wearing other licenses. AB 26. It is hard to understand how requiring plumbers to wear their professional credentials works a "visceral

[9] Harbor Plumbing implies that requiring plumbers to wear licenses while working is similar to Nazis forcing Jews to wear the Star of David during the Holocaust. AB 27. This is offensive. Harbor Plumbing should not inflate the importance of its constitutional claims by diminishing the horrific experiences of millions during the Nazi era.

invasion" into a plumber's mind. AB 28. It is common for people to wear identification at work.

Although courts may provide advisory opinions in rare circumstances, the issues raised in challenging the constitutionality of RCW 18.106.020(1) do not rise to the level of public importance needed to trigger the exception. Further, the constitutional challenges are not ripe for judicial review, which is a pre-requisite for the exception to apply. *League of Educ. Voters v. State*, 176 Wn.2d 808, 820, 295 P.3d 743 (2013). Therefore, the trial court properly declined to review the challenge.

C. This Court Should Not Award Attorney Fees to Harbor Plumbing

This Court should not award attorney fees to Harbor Plumbing. Washington courts follow the American rule in not awarding attorney fees as costs absent a contract, statute, or recognized equitable exception. *City of Seattle v. McCready*, 131 Wn.2d 266, 273–74, 931 P.2d 156 (1997). The UDJA does not authorize attorney fees. *Id.* at 274. Even if this Court determines that Harbor Plumbing's constitutional claim is justiciable, which it should not, Harbor Plumbing cannot receive attorney fees for its UDJA claim.

For the APA rulemaking claim, this Court should decline to award attorney fees to Harbor Plumbing because it should not prevail. *See* AB 47-48. Under the Equal Access to Justice Act, "a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust." *Silverstreak v. Dep't of Labor & Industries*, 159 Wn.2d 868, 891, 154 P.3d 891 (2007) (quoting RCW 4.84.350(1)). Because the trial court correctly dismissed Harbor Plumbing's claims, it is not entitled to fees.

Harbor Plumbing should not prevail, but even if it does, it would be premature to award attorney fees under the Equal Access to Justice Act. Instead, this Court should remand to the trial court to determine whether the Department's motion to dismiss was substantially justified, whether Harbor Plumbing is a qualified party, and whether circumstances make an award unjust. *See Brown v. Dep't of Soc. & Health Servs.*, 190 Wn. App. 572, 598, 360 P.3d 875 (2015).[10]

[10] When Harbor Plumbing quotes the attorney fee provision of RCW 4.84.350(1), it employs an ellipsis to omit the language "unless the court finds that the agency action was substantially justified or that circumstances make an award unjust," leaving the impression that a qualified party automatically receives attorney fees whenever it prevails. AB 48. Prevailing is necessary but not sufficient to receive fees. The court does not award fees if the agency's position is substantially justified, as the Department's position is here.

VI. CONCLUSION

The trial court correctly dismissed Harbor Plumbing's APA and constitutional challenges. This case concerns a voluntary regulation that Harbor Plumbing can disregard if it wishes. This Court should affirm.

RESPECTFULLY SUBMITTED this 15th day of September, 2017.

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Appendix A

RCW 34.05.010
Definitions.

. . . .

(16) "Rule" means any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings; (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law; (d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession; or (e) which establishes, alters, or revokes any mandatory standards for any product or material which must be met before distribution or sale. The term includes the amendment or repeal of a prior rule, but does not include (i) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public, (ii) declaratory rulings issued pursuant to RCW 34.05.240, (iii) traffic restrictions for motor vehicles, bicyclists, and pedestrians established by the secretary of transportation or his or her designee where notice of such restrictions is given by official traffic control devices, (iv) rules of institutions of higher education involving standards of admission, academic advancement, academic credit, graduation and the granting of degrees, employment relationships, or fiscal processes, or (v) the determination and publication of updated nexus thresholds by the department of revenue in accordance with RCW 82.04.067.

. . . .

[2014 c 97 § 101; 2013 c 110 § 3; 2011 c 336 § 762; 1997 c 126 § 2; 1992 c 44 § 10; 1989 c 175 § 1; 1988 c 288 § 101; 1982 c 10 § 5. Prior: 1981 c 324 § 2; 1981 c 183 § 1; 1967 c 237 § 1; 1959 c 234 § 1. Formerly RCW 34.04.010.]

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